153 U.S. 456

RECORD, CASE No. 14,362.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No, 316.

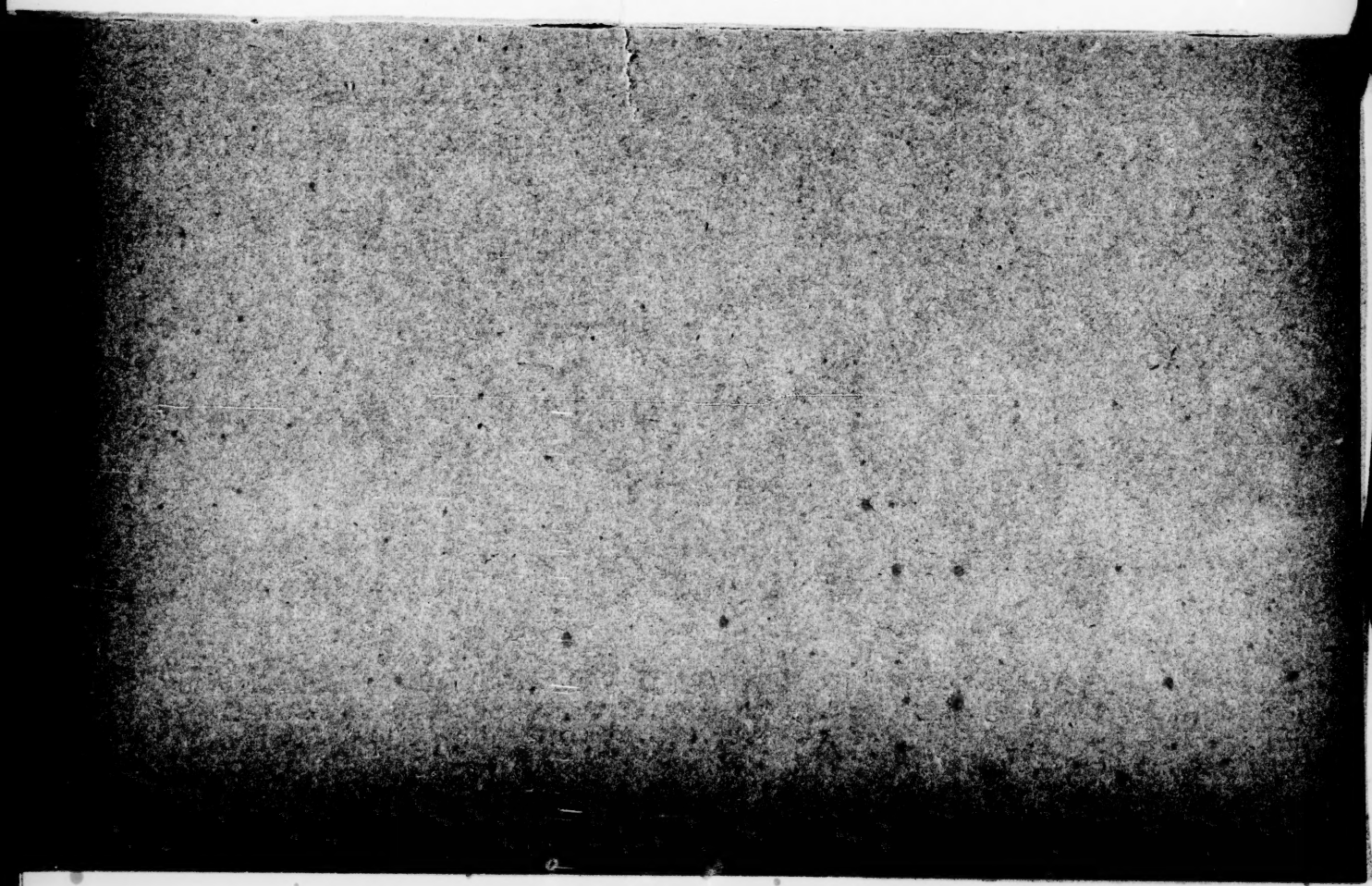
JOHN STEWART, PLAINTIFF IN ERROR,

vs.

BENJAMIN H. BARNES, EXECUTOR OF WILLIAM H. BARNES, DECEASED, LATE COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 20, 1890.



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1 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between John Stewart, plaintiff, and Benjamin H. Barnes, executor of William H. Barnes, deceased, defendant, in a plea of —, a manifest error has intervened, to the great damage of the said John Stewart, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this twelfth day of March, A. D. one thousand eight hundred and ninety, and in the one hundred and fourteenth year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To Benjamin H. Barnes, executor of William H. Barnes, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein John Stewart is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 18th day of March, in the year of our Lord one thousand eight hundred and ninety.

WM. BUTLER, *Judge.*

Service of the above citation is accepted.

W. W. CARR,
Ass't U. S. Att'y.

25 M'ch, 1890.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN STEWART
vs.
BENJAMIN H. BARNES, Executor of William H. Barnes, Deceased.
} No. 22. October Session, 1887.

UNITED STATES OF AMERICA, } ss:
Eastern District of Pennsylvania, }

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1887, No. 22.

It is thus contained:

Be it remembered that on the nineteenth day of October, in the year of our Lord one thousand eight hundred and eighty-
4 seven, Benjamin H. Barnes, executor of William H. Barnes, deceased, by his attorney, John K. Valentine, Esq., comes into court here and presents his petition for certiorari in the words and figures following, to wit:

5 In the Circuit Court of the United States for the Eastern District of Pennsylvania, in the Third Circuit.

The petition of Benjamin H. Barnes, executor of William H. Barnes, deceased, respectfully represents:

That a suit has been commenced by summons case against him as defendant by John Stewart in the court of common pleas of Bucks county, in the State of Pennsylvania, to — term, 188–, No. —.

That the said suit is brought on account of an act done by the said William H. Barnes under the revenue laws of the United States, as collector of internal revenue for the first district of Pennsylvania, the said suit being to recover a certain sum of money claimed to be due the said plaintiff on account of the collection of certain internal-revenue taxes on distilled spirits by the said William H. Barnes, collector aforesaid.

Your petitioner respectfully prays that the said cause may be entered on the docket of your honorable court and proceeded in as a cause therein originally commenced, and that a writ of certiorari be immediately issued by the clerk of your honorable court to the said court of common pleas for the county of Bucks to send to the said circuit court of the United States the record and proceedings

in said cause, according to the provisions of the act of Congress in such case made and provided.

And he will ever pray, &c.

BENJAMIN H. BARNES.

Benjamin H. Barnes, being duly affirmed, says that the facts set forth in the above petition are true to the best of his knowledge and belief.

BENJAMIN H. BARNES.

Affirmed and subscribed before me this 15th day of October, 1887.

——— ———.

I hereby certify that as counsel for the above petitioner I have examined the proceedings against him and carefully enquired into all the matters set forth in the above petition, and that I believe the same to be true.

JOHN K. VALENTINE,
Att'y for Def't.

6 [Endorsed:] No. 22. Oct. sessions, 1887. Circuit court United States, eastern district of Pennsylvania, in the third circuit. John Stewart *vs.* Benjamin H. Barnes, executor of William H. Barnes, deceased. Petition for certiorari. John K. Valentine, attorney for petitioner. Filed 19 Oct., 1887.

7 And afterwards, to wit, on the 19th day of October, A. D. 1887, upon reading the petition of Benjamin H. Barnes, executor, &c., the court orders a writ of certiorari to issue for the removal of the cause from the court of common pleas of Bucks county to this court, in the words and figures following, to wit:

8 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *set:*

The President of the United States to the honorable the judges of the court of common pleas of Bucks county and State of Pennsylvania, Greeting:

Whereas, lately, in your said court of common pleas suit has been commenced against Benjamin H. Barnes, executor of William H. Barnes, deceased, late collector of internal revenue for the first district of Pennsylvania, by John Stewart, which said suit, as it is said, it still pending before you in the said court of common pleas undetermined, and whereas, on the application of the said Benjamin H. Barnes, executor, to the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, on a suggestion, supported by proper evidence, that the said suit was brought on account of an act done by him, the said William H. Barnes, under color of his office as collector of internal revenue for the first district of Pennsylvania, the said suit having been brought to recover certain moneys claimed to be due the said plaintiff on account of the

collection of certain internal-revenue taxes on distilled spirits by the said William H. Barnes, collector as aforesaid, and praying that a writ of certiorari may be immediately issued by the clerk of the said circuit court of the United States, directed to the said court of common pleas, to send to the said circuit court of the United States the record and proceedings in the said cause, according to the provision of the act of Congress in such case made and provided:

Wherefore you are hereby commanded to transmit, under your seal, the record and proceedings of the said suit, with all things thereunto relating, unto the said circuit court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, in the third circuit, on the first Monday of November, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States may be able therein to proceed and do what shall appear of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 19th day of October, A. D. 1887, and in the 112th year of the Independence of the United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

9 [Endorsed:] No. 22. Oct. sess., 1887. Circuit court U. S. John Stewart *vs.* Benjamin H. Barnes, executor of William H. Barnes, deceased. Writ of certiorari. Filed 26 Oct., 1887.

To the honorable the judges of the U. S. circuit court for the eastern district of Pennsylvania:

The record and process and all things touching the same, as full and entire as before me they remain, I certify and send as within I am commanded, together with this writ.

HARMAN YERKES,
Pres't Judge.

10 C. P. Bucks County, May Term, 1887.

JOHN STEWART
vs.
BENJAMIN H. BARNES, Executor of William H. Barnes, Deceased. } No. 42.

Issue summons case as above, returnable *sec. reg.*

GEO. ROSS & L. L. JAMES,
Att'ys for Plaintiff.

To pro'thy C. P.

(Endorsed:) No. 42. May term, 1887. Stewart *vs.* Barnes. Filed April 25, 1887.

11 BUCKS COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Bucks, Greeting:

We command you that you summon Benjamin H. Barnes, executor of William H. Barnes, dec'd, so that he be and appear before our court of common pleas to be holden at Doylestown, in and for the said county, on the 16th day of May next, there to answer John Stewart of a plea of trespass on the case, &c.; and have you then there this writ.

Witness the Honorable Harman Yerkes, president of our said court, at Doylestown, this 25th day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] THOS. T. MILLER,
Dy Prothonotary.

12 (Endorsed:) No. 42. May term, 1887. John Stewart *vs.* Benjamin H. Barnes, ex. Summons case. Geo. Ross & L. L. James, att'ys.

Sheriff's costs, $1.65.

April 27th, 1887.—Summoned the defendant personally by giving him a true and attested copy and informing him of the contents thereof.

So answers—

ELIAS EASTBURN, *Sheriff.*

13 In the Court of Common Pleas of Bucks County, May Term, A. D. 1887.

JOHN STEWART
vs.
BENJAMIN H. BARNES, Executor of William H. Barnes, Dec'd. } No. 42.

Geo. Ross, L. L. James.

Apr. 25.—Summons case.

April 27, 1887.—Summoned the defendant personally by giving him a true and attested copy and informing him of the contents thereof.

So answers—

ELIAS EASTBURN, *Sheriff.*

Oct. 20, 1887.—Writ of certiorari from the U. S. circuit court for the eastern district of Pennsylvania came to hand.

Sheriff	$1 65
Pro.	2 50
Att'y	3 00
T. & W.	2 00
C'r.	13
Dis.	25
	$9 53

STATE OF PENNSYLVANIA, }
County of Bucks, } ss:

I, Thos. T. Miller, dep'y prothonotary of the court of common pleas in and for the county of Bucks, in the State aforesaid,
14 do certify that the above and foregoing comprises all the original papers and copies of docket entries in the hereinbefore-stated case as fully as the same remain of record in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Doylestown, this 25th day of
[SEAL.] October, A. D. 1887.

THOS. T MILLER,
Dep'y Prothonotary.

15 And afterwards, to wit, on the 25th day of February, A. D. 1889, the plaintiff, by his attorney, James W. M. Newlin, Esq., comes into court here and files his declaration, which, being read, is as follows, to wit:

16 In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, one thousand eight hundred and eighty-seven.

No. —.

COUNTY OF PHILADELPHIA, }
State of Pennsylvania. }

Benjamin H. Barnes, executor of William H. Barnes, deceased, late of the county aforesaid, defendant, was attached to answer John Stewart in a plea of trespass on the case upon promises: and thereupon the said plaintiff, by James W. M. Newlin, his attorney, complains, for that whereas the said defendant, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and eighty-six, to wit, at the county aforesaid, was indebted to the said defendant in the sum of three hundred dollars, lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff to the said defendant before that time sold and delivered at his special instance and request.

And also in the further sum of $300, like money, for the work, care, and diligence of the said plaintiff by him before that time done, performed, and bestowed in and about the business of the said defendant at his like special instance and request.

17 And also in the further sum of $300, like money, for so much money by the said plaintiff before that time lent and advanced and paid, laid out, and expended to and for the use fo the said defendant and at his like instance and request.

And also in the further sum of $300, like money, for other money by the said defendant before that time had and received to and for the use of the said plaintiff.

And also for the further sum of $300, like money, for so much money then and there found to be due and owing from the said

defendant to the said plaintiff and in arrear and unpaid, upon an account then and there stated between them.

And, being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook and faithfully promised the said plaintiff to pay him the said several sums of money in this count mentioned when he, the said defendant, should be thereunto afterwards requested.

Nevertheless the said defendant, not regarding his said several promises and undertakings, has not paid the said several sums of money or any of them or any part thereof to the said plaintiff, although often requested so to do, but the said defendant has hitherto neglected and refused and still does neglect and refuse to pay the same to the said plaintiff, to the damage of the said plaintiff three hundred dollars; and therefore he brings suit, &c.

JOHN DOE,
RICHARD ROE, *Pledges, &c.*

JAMES W. M. NEWLIN,
Plaintiff's Attorney.

18 (Endorsed:) No. 22. Oct. session, 1887. Circuit court U. S., E. D. Pa. Stewart *vs.* Barnes. Declaration. Filed Feb. 25, 1889. Newlin, pl'ff's attorney.

19 And afterwards, to wit, on the 25th day of February, A. D. 1889, the plaintiff, by his attorney, James W. M. Newlin, Esq., comes into court here and files his bill of particulars, which, being read, is as follows, to wit:

20 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Session, 1887.

JOHN STEWART
vs.
BARNES.

Bill of Particulars.

Plaintiff claims $250.40, with interest from June 26, 1869, illegally collected by defendant's testator from plaintiff in the following circumstances:

1. That the plaintiff is a dealer in distilled spirits and the defendant's testator was a collector of internal revenue, and certain distilled spirits in United States bonded warehouse were owned by the plaintiff prior to April 14, 1869, and the said distilled spirits were withdrawn from the United States bonded warehouse for sale or consumption by the plaintiff on June 26, 1869. Said spirits had been manufactured and placed in U. S. b*i*nded warehouse prior to July 20, 1868. Upon withdrawing said spirits the plaintiff was required by the defendant to pay a tax upon an amount of spirits in excess of the amount withdrawn, as found by actual g*u*age at the time of withdrawal.

2nd. The following shows the particulars of the transaction:

Number of packages withdrawn, 46.

21 Whole quantity of spirits withdrawn by plaintiff from U. S. warehouse, 1,819.14 proof gallons, or 1,833 package or taxable gallons. On June 26, 1869, the rate of tax exacted and collected by defendant per gallon on distilled spirits withdrawn from U. S. warehouse for sale or consumption was as follows: On spirits manufactured and bonded prior to July 20, 1868, the sum of $62\frac{7}{10}$ cents per gallon, reckoning each fraction of a gallon in each package as a whole gallon; on spirits manufactured and bonded under the provisions of the act of July 20, 1868, the sum of 50 cents per gallon, reckoning each fraction of a gallon as a whole. The spirits involved in this case were manufactured and bonded prior to July 20, 1868, and the rate of tax collected by defendant from plaintiff was $62\frac{7}{10}$ cents per gallon, reckoning each fraction of a gallon in each package as a whole gallon.

Total amount of tax exacted and collected from plaintiff by defendant, $1,382.51.

The defendant in exacting this tax found the same by the following computation, to wit:

The spirits actually withdrawn, 1,819.14 proof gallons, were increased by reason of counting fractions of gallons as whole gallons, and this process added to the quantity of spirits actually withdrawn the further imaginary quantity of 13.86 proof gallons, mak-

22 ing, as aforesaid, 1,833 package or taxable gallons; and in further addition defendant exacted a tax estimated on 388.54 proof gallons of spirits admitted by defendant to have been lost by leakage, evaporation, or otherwise while the same was stored in U. S. warehouse and before this withdrawal.

So that the detailed statement of the tax exacted by defendant is as follows:

On actual spirits withdrawn, 1,819.14 gals., at $62\frac{7}{10}$c.	$1,132 11
On increase (fraction- counted as wholes), 13.86 gals., at $62\frac{7}{10}$c.	8 62
On spirits alleged to have been lost in U. S. warehouse, 388.54 gals., at $62\frac{7}{10}$c.	241 78
Total exacted	$1,382 51

The two sums, to wit, $8.62 and $241.78, in addition to the sum of $1,132.11, were paid by plaintiff June 26, 1869, to the defendant under protest.

J. M. NEWLIN,
Pl'ff's Att'y.

23 (Endorsed:) No. 22. October session, 1887. Circuit court U. S., E. D. of Pa. Stewart *vs.* Barnes. Bill of particulars. Filed Feb. 25, 1889. Newlin, pl'ff's attorney.

24 And afterwards, to wit, on the 4th day of April, A. D. 1888, the defendant, by his attorney, comes into court here with leave and files a special plea in the words and figures following, to wit:

JOHN STUART *vs.* BARNES, Executor. } U. S. C. C., October Sessions, 1887. No. 22.

Special Plea.

And now, to wit, the fourth day of April, 1889, the court, on motion of John R. Read, Esq., U. S. attorney, grant leave to amend the plea filed in the above case by filing an additional plea as follows, to wit:

And the defendant says that to entitle the above plaintiff to maintain the above suit appeal was not duly made to the Commis-
25 sioner of Internal Revenue according to the provisions of law, and the above suit was not duly brought within the period of time allowed thereby; and this the defendant is ready to verify, &c.

(Endorsed:) U. S. C. C. Oct., '87. 22. Stuart *vs.* Barnes. Special plea filed by leave of court. Filed Apr. 4, 1889.

26 And thereupon it is ordered that a jury come to try the issue joined in this case.

And afterwards, to wit, on the fourth day of April, A. D. 1889, came the parties aforesaid, and the jurors of the jury aforesaid, being called, likewise came, to wit, John R. Stoey, Henry Bower, Levi W. Groff, Jacob G. Frick, Rich'd Edmunds, Joseph M. Shoemaker, George W. Kerns, Wm. F. Donaldson, Joseph T. Ferree, Isaac M. Goldsmith, Francis Stokes, John C. Gehley, who are duly empanelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this case.

And afterwards, to wit, on the day and year last aforesaid, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say that they find for the defendant.

27 And afterwards, to wit, on the 11th day of April, A. D. 1889, the plaintiff, by his attorney, comes into court here and moves the court for a new trial and files his reasons in the words and figures following, to wit:

STEWART *vs.* BARNES. } C. C. U. S. April Session, 1887. No. —.

And now, April 11, 1889, the pl'ff moves for a new trial and assigns the following reasons:

I. Because the charge of the learned court was against the evidence.

II. Because the charge of the learned court was against the law.
III. Because the verdict was against the evidence.
IV. Because the verdict was against the law.

28 JAMES W. M. NEWLIN,
Att'y for Pl'ff.

(Endorsed:) No. 22. Oct. sessions, 1887. C. C. U. S. Stewart *vs.* Barnes. Motion and reasons for new trial. Filed April 11, 1889. Newlin.

29 And afterwards, to wit, on the 11th day of April, A. D. 1890, this cause being called for argument on motion for a new trial and having been argued by counsel for the respective parties and duly considered by the court, it is ordered that the motion for a new trial be overruled and judgment entered on the verdict in favor of defendant and against the plaintiff.

Whereupon judgment is entered accordingly.

And afterwards, to wit, on the 10th day of January, A. D. 1890, the plaintiff, by his attorney, files the following bill of exceptions, to wit:

30 Be it remembered that in the October sessions, A. D. 1887, No. 22, came John Stewart into the circuit court of the United States for the eastern district of Pennsylvania and impleaded Benjamin H. Barnes, executor of William H. Barnes, deceased, in a certain plea of trespass on the case, &c., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut* pleas), and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at Philadelphia, before the Honorable William McKennan, circuit judge, president of the said court, on Thursday, the fourth day of April, A. D. 1889, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impannelled (*pro ut* list of jurors); at which day came as well the said

31 plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid, impannelled to try the said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff called JOHN F.

32 CLINE, deputy collector of internal revenue, who testified as follows:

The plaintiff withdrew from United States bonded warehouse, in the first district of Pennsylvania, on June 26, 1869, certain distilled spirits, which were owned by the plaintiff prior to April 14, 1869. They were manufactured and placed in United States bonded warehouse prior to July 20, 1868. Plaintiff withdrew them for sale or consumption on June 26, 1869.

The plaintiff withdrew spirits and was charged thereon taxes as follows:

On actual spirits withdrawn, 1,819.14 gallons, at $62\frac{7}{10}$c...	$1,132 11
On increase (fractions counted as wholes) 13.86 gallons, at $62\frac{7}{10}$c.....	8 62
On spirits alleged to have been lost in U. S. warehouse, 388.54 gallons, at $62\frac{7}{10}$c.....	241 78
Total exacted and paid June 26, 1869.....	1,382 51

The above amount of taxes (1,382.51) was paid by the plaintiff to the defendant's testator, who was then collector of internal revenue in the first district of Pennsylvania.

The said JOHN F. CLINE was examined by Mr. NEWLIN, for the plaintiff:

Q. These spirits were not originally bonded by Mr. Stewart, but by some one else?

33 A. No, sir; they were not bonded by Mr. Stewart.

The DISTRICT ATTORNEY: It is admitted that the original claim was presented August 3rd, 1871, for $241.78, for refund of taxes collected.

Counsel for plaintiff calls for the production of the papers already called for, to wit, the amended claim, together with all papers evidencing the successive rejections and reopenings of the claim, the final rejection being April 28, 1886, as contended by plaintiff.

The amended claim having been produced, counsel for plaintiff offers same in evidence, together with the memorandum upon it of the original filing of the claim and the action of the department in from time to time rejecting and reopening it and finally rejecting the claim upon April 28, 1886.

Cross-examination.

By the district attorney:

Q. You have spoken of proof gallons and of taxable gallons. Please explain what these different terms are. What is the meaning of proof gallons?

34 A. A proof gallon is spirits which show a strength of 100 by the hydrometer—that is to say, a composition of pure spirits and water in the proportion of one to two.

Q. And when the spirits were put in the United States bonded warehouse the gauge was taken in that way by the hydrometer?

A. Certainly.

Q. And those were the proof gallons you have spoken of here in connection with this case? Of those there were how many?

A. Of this lot?

Q. Yes.

A. The original proof gallons in the first lot of twenty-seven barrels was 1,294.84, and in the nineteen packages 913.34, originally as they went into the warehouse.

Q. That is as they went into the warehouse?

A. Yes, sir.

By the COURT:

Q. What were the original proof gallons?
A. 2,207.68 gallons.

By the district attorney:

Q. And these spirits were bonded prior to what date?
A. They were bonded prior to July 20th, 1868.

35 Q. What are packages or taxable gallons in the department?

A. Package or taxable gallons, as we understand it, or at least as we rule in the department, is the counting of a fraction of a gallon over the contents as a full gallon. For example, if a package holds in proof gallons 45.55 it is taxed as 46 gallons.

Q Under what provision of law was that?
A. That is under the act of July 20th, 1868.
Q. And what do you say was the number of proof gallons put in originally?
A. 2,207.68.
Q. When were those spirits originally bonded?
A. That I am not certain of. I have no record in the office. I didn't know that question would come up.

By Mr. NEWLIN:

Q. Were those spirits bonded prior to the passage of the act of July 20th, 1868?
A. Yes, sir; I have answered that question. They were part of a lot that remained in bond December 1st, 1867.
Q. Then they were in bond at least as early as December, 1867?

36 A. Yes, sir; and prior to that time.

By the district attorney:

Q. Of the 1,833 package gallons upon which the tax was paid in 1869, on June 26th, how much were fractions of gallons which under the law of 1868 were taxed as whole gallons?
A. I have no way of telling that precisely. I can figure it out.
Mr. NEWLIN: We will admit that it is 13.86 gallons.
The WITNESS: I make it 13.86.

By the district attorney:

Q. What was the tax upon that number of gallons that was paid when those goods were removed?
A. It was at the rate of $62\frac{7}{36}$ cents.

By Mr. NEWLIN:

Q. We have the calculation $8.62.
A. $8.62; that is correct.
Q. How much was the amount collected on the leakage of 388.54 at the same rate? We have it $241.78.
A. $241.78 is correct.

37. By the district attorney:

Q. The book show- that this tax was paid June 26th, 1869?

A. Yes, sir; the cash book shows that.

Q. The original claim was presented upon August 3rd, 1871. That has been admitted.

A. I was in the second district then; not in the first.

Q. The amended claim was filed March 20th, 1878. What is there here, if anything, which will show the action of the department? Read the dates first and then state what was the action of the department.

Objected to.

The DISTRICT ATTORNEY: The position the Government takes here is that the only claim presented to the department is for $241.78, with interest. The original claim as filed on August 3, 1871, was $241.78, and that is precisely the same amount as is mentioned in the amended claim filed March 20, 1878. The original claim, as we are prepared to show, was rejected by the department in October,
38 1871, and subsequently, as will appear later, an act of Congress was passed for the relief of these people, and this man got $241.78 from the United States, precisely the same amount which he comes here and claims to-day.

The COURT: Congress has said, as it had a right to, that where money is collected from a citizen in the shape of a tax by virtue of the law the Government of the United States shall not be required to pay back that unless the claim therefor is presented within a certain time and certain proceedings are pursued in order to get it. If the plaintiff made a claim for the alleged excess as required by the act of Congress and if he did not pursue what the requirements call for, of course he has no right to bring suit against anybody.

By the DISTRICT ATTORNEY: I show you a letter addressed to the Treasury Department, dated April 28th, 1886. What does that say?

The witness reads said letter as follows:

"T. W. Neill, Esq., attorney-at-law, Washington.

39 SIR: On the sixth of December, 1884, Commissioner Evans addressed a letter to you notifying you that he had considered and rejected the claim of Richard C. Ridgway and thirty-three others as follows: * * * The following claims for refund of taxes paid on spirits lost by leakage in bonded warehouse which are claimed to have been rejected by the commissioner as wrong February 20, 1883, and reopened by him on the 30th of April, 1883, have been taken up for reconsideration, to wit," &c.

Q. Among them is John Stewart's?

A. Among them is John Stewart's $241.78. It was again finally rejected April 28th, 1886. The concluding part of this letter is this: "In view, however, of the opinion of the Attorney General, dated May 5, 1880, and January 12, 1883, I must hold that the taxes were legally collected. The claims are hereby rejected."

By Mr. NEWLIN:

Q. That is the date of April 28, 1886, is it not?
A. April 28th, 1886.

40 Letter offered in evidence for plaintiff. Counsel for plaintiff calls for the official regulations of the Internal Revenue Department promulgated as follows: Series 2, No. 9, Oct. 20, 1866; series 3, No. 9, Aug. 29, 1867; series 4, No. 1, Nov. 23, 1868; official instructions, Dec. 5, 1868; series 4, No. 7, Jan. 20, 1869; series 5, No. 7, April 22, 1869. The same are produced and offered in evidence by counsel for plaintiff. The district attorney admitted that thereby it was provided that the tax on distilled spirits owned prior to April 14, 1867, and manufactured and placed in bonded warehouse prior to July 20, 1868, upon being withdrawn for sale or consumption, should be exacted only upon the actual quantity of distilled spirits so withdrawn.

JESSE LEE ADAMS was sworn for defendant.

By the district attorney:

Q. What papers have you belonging to that claim in your possession now from the office?
A. The only paper I have is the receipt given by the attorney and the power of attorney from Mr. Stewart to Mr. Neill, the attorney.

The witness here produces papers referred to.

41 Q. These are filed in the department, are they?
A. They are filed in the Treasury Department.

The district attorney offers in evidence the power of attorney from John Stewart to Thomas W. Neill, "To prosecute to a termination and adjustment my claim against the Government of the United States for the refunding of taxes, improperly paid by me in 1869, on distilled spirits alleged to have been lost by leakage in the United States bonded warehouse."

Objected to. Objection overruled and exception noted for plaintiff.

Mr. NEWLIN: If the receipt is offered in evidence we will admit that the contents of it are true, and that the plaintiff received the money receipted for him by Mr. Neill.

The DISTRICT ATTORNEY: We offer the power of attorney to show the scope of the authority of the agent, namely, "for the refunding of taxes improperly paid by me in 1869."

Objected to. Objection overruled and exception noted for plaintiff.

42 The district attorney further offers in evidence a private act of Congress, approved July 26, 1886, in the words following, to wit:

"An act for the relief of Richard C. Ridgway and others.

Whereas from the time bonded warehouses were first established until April 14, 1869, the law had been uniformly construed and ad-

ministered to allow for loss by leakage on spirits distilled prior to July 20, 1868, while in warehouse; and whereas it was the uniform practice and in accordance with the rules and regulations of the Commissioner of Internal Revenue, approved by the Secretary, to collect internal-revenue taxes upon only so much of the spirits distilled prior to July 20, 1868, as were actually withdrawn from warehouse, under which established regulations large quantities of spirits were bought and sold while in bond; and whereas in a few exceptional cases taxes were also collected on that portion of such spirits which was lost by leakage while remaining in warehouse; therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be and he is hereby required to pay, out
43 of any money in the Treasury not otherwise appropriated, to the following-named persons of the city of Philadelphia, Pa., or their legal representatives, such amounts as shall be shown to the satisfaction of the Commissioner of Internal Revenue to have been paid by them as tax on distilled spirits in excess of the quantity withdrawn by them from warehouse:

Provided, That the amount paid to each shall not exceed the sum herein stated—that is to say:

To Richard C. Ridgway	$8,163 48
H. & A. C. Van Beil	1,601 42
John Stewart	241 78
Walden, Koehn & Co.	748 12
Henry Wallace & Co.	2,984 72
Boule & McManus	380 34
Samuel Macky	102 48
Robert Steel	2,050 39
Lang & Berheimer	500 81
G. H. Vandike & Co.	372 20
Hugh H. Catherwood	868 59
H. & H. W. Catherwood	4,656 73
Bernard Corr	847 50
Woodside & Stadiger	1,259 16
Henry M. Daly	3,896 33
44 David Giltinan	1,078 51
Langstroth & Boulton	3,172 65
John Boyle & Co.	233 09
J. S. Bamberger	501 50
John Corr	900 51
Van Beil & Fiske	277 73
B. G. Powell	182 00
Thomas J. Martin & Co.	1,855 42
Dennis McCauley	585 23
Richard Penistan	395 19
John Lentz	313 80
Joseph F. Tobias & Co.	2,065 78
Hugh Craig	405 31
John Gibson's Son & Co.	3,435 78

The said payments being a refund of taxes exacted and paid on distilled spirits in excess of the quantity withdrawn from warehouse between April 13, 1869, and July 1, 1869, which spirits had been manufactured and bonded prior to July 20, 1868."

And the district attorney further offers in evidence a certified copy of the following receipt:

"*Original Receipt for Draft in Payment of Claims for Refunding.*

45 AUGUST 17, 1886.

Received of the honorable Commissioner of Internal Revenue the sum of two hundred and forty-one dollars and seventy-eight cents ($241.78) on account of my claim, No. 10073, for taxes improperly paid by me.

JOHN STEWART,
By T. W. NEILL, *Attorney.*"

Defendant closes.

The plaintiff thereupon submitted certain points of charge as follows:

Points of Charge.

Plaintiff asks the court to charge the jury as follows:

I. That the spirits withdrawn by the plaintiff June 26, 1869, were manufactured and placed in United States bonded warehouse prior to July 20, 1868, and plaintiff was only liable to pay a tax on the number of gallons of spirits then actually withdrawn by him from bonded warehouse, to wit, 1,819.14 proof gallons, on which the tax was $1,132.11, and that defendant's testator unlawfully exacted in excess thereof the sum of $250.40, of which $241.78 was exacted as a tax on spirits which had originally been bonded, but which
46 had disappeared by leakage, evaporation, or otherwise, and $8.62 of which was exacted by counting fractional gallons as whole gallons.

Affirmed.

II. That at common law the plaintiff became forthwith entitled to bring an action against the defendant's testator in his individual capacity and not as a United States collector of internal revenue, which right was suspended by the act of Congress of — until plaintiff had appealed from the illegal tax to the Commissioner of Internal Revenue, and his appeal was finally rejected by the Commissioner of Internal Revenue April 28, 1886.

Refused.

III. That upon the final rejection of the plaintiff's claim by the Commissioner of Internal Revenue the plaintiff's right of action against the defendant's testator in his individual capacity revived and his action must be commenced within one year thereafter, and this action was brought within the statutory time, as the record shows.

Refused.

47 IV. That the measure of liability of the defendant's testator is the amount of the tax illegally exacted by him from

the plaintiff, to wit, $250.40, with interest at six per centum from June 26, 1889, to the date of the verdict, subject to a credit of $241.78, which is the amount of this claim.

Refused.

V. That the sum of $241.78, paid plaintiff on the 17th day of August, A. D. 1886, was not a payment of his claim made by his appeal to the Commissioner of Internal Revenue under the acts aforesaid, and that said claim had previously been rejected and was not pending in the Treasury Department at that time. The same was a voluntary payment by the United States, without any conditions, of a part of a sum of money then due to the plaintiff, not from the United States or in recognition of the plaintiff's rejected claim, but from the defendant's testator in his individual capacity. This sum was paid and received expressly on account.

Refused.

48 VI. The plaintiff may and has elected to apply this sum as a payment on account of the sum of $507.83, to wit, $250.40, the excess of tax, and *and* 257.43, interest thereon from June 26, 1869, to August 17, 1886, which was upon that day due to plaintiff by defendant's testator, and the plaintiff is entitled to a verdict for the balance then due, to wit, $266.05, with interest thereon to date.

Refused.

VII. The present action is not against the United States, nor is it an action against the defendant's testator in his capacity of a United States collector of internal revenue, but the same is an action against him in his individual capacity, and is to be governed by the same rules as other actions between private citizens.

Refused.

VIII. That the plaintiff's claim against the United States was not reopened and allowed after April 28, 1886.

Affirmed.

49 IX. That the Commissioner of Internal Revenue had no judicial functions to perform under the private act of July 26, 1886, and his duty thereunder was purely ministerial and was limited to ascertaining what excessive tax had been exacted from the plaintiff, and this inquiry and the payment of $241.78 to the plaintiff were solely by virtue of the provisions of the said private act of Congress.

Affirmed.

By the COURT: The first point is affirmed. The second, third, fourth, fifth, sixth, and seventh are refused. The eighth and ninth are affirmed.

Exceptions noted for plaintiff for refusal of 2nd, 3rd, 4th, 5th, 6th, and 7th points.

The COURT: Although I do not give you any binding instructions to that effect, yet, in the judgment of the court, under all the evidence in the case, the defendant here is entitled to a verdict. As the

case is presented to you, in — judgment of the court you could only find a verdict properly in favor of the defendant.

Exception for plaintiff.

The jury thereupon rendered a verdict for the defendant.

50 And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said plaintiff did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 10th day of January, A. D. 1890.

W. McKENNAN, [SEAL.]
Cir. Judge.

51 (Endorsed:) 22. October sessions, 1887. C. C. U. S., E. D. of Penna. Stewart *vs.* Barnes, ex'r. Bill of exceptions. Filed Jan. 10, 1890.

52 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

JOHN STEWART
vs.
BENJAMIN H. BARNES, Executor of William H. Barnes, Deceased. } No. 22. October Sess., 1887.

Know all men by these presents that we, John Stewart, as principal, and Hugh W. Catherwood, No. 1708 Walnut street, and David Giltinan, No. 1830 Green street, of the city of Philadelphia and State of Pennsylvania, as sureties, are held and firmly bound unto Benjamin H. Barnes, executor of William H. Barnes, deceased, in the full and just sum of five hundred dollars ($500), to be paid to the said Benjamin H. Barnes, executor of William H. Barnes, deceased, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of March, A. D. 1890.

Whereas, lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between John Stewart, plaintiff, and William H. Barnes, deceased, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation

directed to the said Benjamin H. Barnes, executor of William
53 H. Barnes, deceased, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said John Stewart shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN STEWART. [SEAL.]
HUGH W. CATHERWOOD. [SEAL.]
DAVID GILTINAN. [SEAL.]

Sealed and delivered in presence of—
SAMUEL BELL.
W. VON A. WILLIAMSON.

Sureties approved.
WM. BUTLER, *Judge.*

[Endorsed:] No. 22. October sess., 1887. Circuit court United States. Stewart *vs.* Barnes, exe'r. Bond surwrit of error. Filed March 18, 1890.

54 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *set:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of John Stewart *vs.* Benjamin H. Brown, executor of William H. Barnes, deceased, No. 22, October session, 1887, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 31st day of March, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: Case No. 14,362. E. Pennsylvania C. C. U. S. No. 316. John Stewart, plaintiff in error, *vs.* Benjamin H. Barnes, executor of William H. Barnes, deceased, late collector of internal revenue. Filed October 20, 1890.

Office Supreme Court U. S.
FILED.
MAR 19 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

JOHN STEWART, Plaintiff in Error,

vs.

BENJAMIN H. BARNES, Executor of William H. Barnes, Deceased (late Collector of Internal Revenue).

No. 316.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR PLAINTIFF IN ERROR.

T. W. NEILL,
JAMES W. M. NEWLIN,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN STEWART, plaintiff in error,

vs.

BENJAMIN H. BARNES, Executor of William H. Barnes, deceased (late Collector of Internal Revenue). } No. 316.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action brought on April 25, 1887 (Record, p. 4), by John Stewart (plaintiff in error) against Benjamin H. Barnes, executor of William H. Barnes, deceased (who had

been a collector of internal revenue), to recover the sum of $250.40, taxes on spirits overpaid on June 26, 1869 (Record, p. 10 and 11), with interest from that time (Record, p. 7, bill of particulars) less $241.78 paid on account August 17, 1886 (Record, p. 16). The collector had erroneously exacted a tax on leakage amounting to $241.78, and on fractional gallons counted as whole gallons erroneously increased, $8.62 (Record, p. 11), both of which exactions the Court below (without exception thereto) held to be illegal (Record, p. 16, first point of charge affirmed).

The plaintiff had appealed to the Department as required by law on August 3, 1871 (Record, p. 11 and p. 13), and the appeal was finally rejected April 28, 1886 (Record, p. 13, testimony of John F. Cline, deputy collector). Under a private Act of Congress approved July 26, 1886 (Record, p. 14), the plaintiff received on August 17, 1886, $241.78, for which he gave the Department a receipt "*on account* of my claim No. 10,073 for taxes improperly paid by me" (Record, p. 16).

The facts in detail (which are not disputed) were found by the Court below (without exception) to be as follows (Record, p. 16):—

> "That the spirits withdrawn by the plaintiff, June "26, 1869, were manufactured and placed in United "States bonded warehouse prior to July 20, 1868, and "plaintiff was only liable to pay a tax on the number "of gallons of spirits then actually withdrawn by him "from bonded warehouse, to wit, 1,819.14 proof "gallons, on which the tax was $1,132.11, and that de- "fendant's testator unlawfully exacted in excess thereof "the sum of $250.40, of which $241.78 was exacted as "a tax on spirits which had originally been bonded, "but which had disappeared by leakage, evaporation "or otherwise, and $8.62 of which was exacted by "counting fractional gallons as whole gallons."
>
> "Affirmed."

The Act of Congress under which the sum of $241.78 was paid on account, on August 17, 1886, reads as follows (Record, p. 14):—

STATUTES AT LARGE, 24, P. 853, CH. 783.

An act for the relief of Richard C. Ridgway and others.

Whereas from the time bonded warehouses were first established until April fourteenth, eighteen hundred and sixty-nine, the law had been uniformly construed and administered to allow for loss by leakage on spirits distilled prior to July twentieth, eighteen hundred and sixty-eight, while in warehouse; and

Whereas it was the uniform practice and in accordance with the rules and regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, to collect internal revenue taxes upon only so much of the spirits distilled prior to July twentieth, eighteen hundred and sixty-eight, as were actually withdrawn from warehouse, under which established regulations large quantities of spirits were bought and sold while in bond; and

Whereas in a few exceptional cases taxes were also collected on that portion of such spirits which was lost by leakage while remaining in warehouse: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, required to pay, out of any money in the Treasury not otherwise appropriated, to the following-named persons, of the city of Philadelphia, Pennsylvania, or their legal representatives, respectively, such amounts as shall be shown, to the satisfaction of the Commissioner of Internal Revenue, to have been paid by them as tax on distilled spirits in excess of the quantity withdrawn by them from warehouse: *Provided*, That the amount paid to each shall not exceed the sum hereinafter stated, that is to say:—

To Richard C. Ridgway, eight thousand one hundred and sixty-three dollars and forty-eight cents.

To H. and A. C. Van Beil, one thousand six hundred and one dollars and forty-two cents.

To John Stewart, two hundred and forty-one dollars and seventy-eight cents.

To Walden, Koehn and Company, seven hundred and forty-eight dollars and twelve cents.

To Henry Wallace and Company, two thousand nine hundred and eighty-four dollars and seventy-two cents.

To Boyle and McManus, three hundred and eighty dollars and thirty-four cents.

To Samuel Mackey, one hundred and two dollars and forty-eight cents.

To Robert Steel, two thousand and fifty-one dollars and thirty-nine cents.

To Lang and Bernheimer, five hundred dollars and eighty-one cents.

To G. H. Vandyke and Company, three hundred and seventy-two dollars and twenty cents.

To Hugh W. Catherwood, administrator of the estate of A. J. Catherwood, deceased, eight hundred and eighty-six dollars and fifty-nine cents.

To H. and H. W. Catherwood, four thousand six hundred and fifty-six dollars and seventy-three cents.

To Bernard Corr, eight hundred and forty-seven dollars and fifty cents.

To Woodside and Stadiger, one thousand two hundred and fifty-nine dollars and sixteen cents.

To Henry M. Daly, three thousand eight hundred and ninety-six dollars and thirty-three cents.

To David Giltinan, one thousand and seventy-eight dollars and fifty-one cents.

To Langstroth and Boulton, three thousand one hundred and seventy-two dollars and sixty-five cents.

To John Boyle and Company, two hundred and thirty-three dollars and nine cents.

To J. S. Bamberger, five hundred and one dollars and fifty cents.

To John Corr, nine hundred dollars and fifty-one cents.

To Van Beil and Fiske, two hundred and seventy-seven dollars and seventy-three cents.

To B. G. Powell, one hundred and eighty-two dollars.

To Thomas J. Martin and Company, one thousand eight hundred and fifty-five dollars and forty-two cents.

To Dennis McCauley, five hundred and eighty-five dollars and twenty-three cents.

To Richard Penistan, three hundred and ninety-five dollars and nineteen cents.

To John S. Lentz, three hundred and thirteen dollars and eighteen cents.

To Joseph F. Tobias and Company, two thousand and sixty-five dollars and seventy-eight cents.

To Hugh Craig and Company, four hundred and five dollars and thirty-one cents.

To John Gibson's Sons and Company, three thousand four hundred and thirty-five dollars and seventy-eight cents.

The said payments being a refund of taxes exacted and paid on distilled spirits in excess of the quantity withdrawn from warehouse between April thirteenth, eighteen hundred and sixty-nine, and July first, eighteen hundred and sixty-nine, which spirits had been manufactured and bonded prior to July twentieth, eighteen hundred and sixty-eight.

Approved, July 26, 1886.

The receipt given by the plaintiff for the payment made under this act reads as follows (Record, p. 16).

"*Original Receipt for Draft in Payment of Claims for Refunding.*

"AUGUST 17, 1886.

"Received of the Honorable Commissioner of Internal "Revenue, the sum of two hundred and forty-one dollars "and seventy-eight cents ($241.78), on account of my claim, "No. 10,073, for taxes improperly paid by me.

"JOHN STEWART.

"By T. W. NEILL,

"*Attorney.*"

In these circumstances the plaintiff claimed that Barnes' executor owed him, on August 17, 1886, $250.40 (excess of tax), with interest to date, viz., $257.43, making the total indebtedness on August 17, 1886, $507.83, upon which he credited the sum of $241.78, received on account under the private Act of Congress, and asked the Court to direct a verdict in his favor for the balance, viz., $266.05, with interest thereon from August 17, 1886, to the day of trial. This the Court declined, in refusing plaintiff's points to that effect (Record, pp. 16–17, plaintiff's points iv, v and vi declined).

THE DEPARTMENT DELAYS.

The long delay in the case in the Department was due to the vacillation of the Government officials. It will be observed from the private Act of Congress (Record, pp. 14–15) and from the letter of the Commissioner *to* Mr. Neill, the attorney for John Stewart (Record, p. 13), (which is erroneously spoken of as a letter *from* Mr. Neill), that John Stewart's case was one which, with others on file in the Department, is spoken of as the cases of "Richard C. Ridg- "way and thirty-three others" in the letter from the Commissioner to Mr. Neill just quoted. These cases are to be taken as one case in considering how the claimants were kept waiting in the Department upon the well-grounded expectation that their claims would be allowed. The Ridgway case is reported in 18 Court of Claims Reports, p. 707. The Court dismissed the claim for want of jurisdiction.

The Court in the Ridgway case made the following findings of fact, which apply equally to the case at bar of John Stewart, viz. :—

"IV.

"On the 3d of August, 1871, the claimant presented to the Commissioner an application for the refund of said $7,929.29, paid by him under protest upon spirits which had leaked from said barrels while in said warehouse."

"On the 17th of February, 1879, the Commissioner, *proposing to allow the claim*, transmitted the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement, in accordance with the following standing regulation prescribed by the Secretary in relation to the refund of taxes by the Commissioner upon appeal to him made therefor" :—

'Where the case of an appeal involves an amount exceeding $250, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement.'

"On the 20th of March, 1879, the Secretary returned the papers to the Commissioner, with a letter declining to advise the refunding of the taxes claimed, and stating his reasons therefor in full."

"The Commissioner, therefore, considered the matter anew. *After reviewing the reasons* given by the Secretary for declining to advise a refund, *in which he did not concur, he made the following allowance*, and transmitted the same to the Fifth Auditor :—

"*A Schedule of claims for the refunding of taxes erroneously asssesed and paid which have been examined and allowed.*

District.	Claimants.	Amount.
1. Penna.....	Richard C. Ridgway.....	$7,538 20
	Total	$7,538 30

"I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed.

GREEN B. RAUM,
Commissioner."

"OFFICE OF INTERNAL REVENUE,
March 25, 1879.

"On the 28th of March, 1879, the Fifth Auditor examined and certified, and transmitted the same to the First Comptroller, in the regular course of business of accounting in the Treasury."

"On the 21st of November, 1879, the First Comptroller returned the allowance, unpaid, to the Commissioner with a request that he reconsider the claim; and on the 24th of November, 1879, the Commissioner having decided to do so, entered of record in his office that the same "is hereby reconsidered."

"Thereafter, on the 16th day of February, 1883, *the Comsioner rejected the claim*, and gave notice thereof to the collector to whom the tax was paid, as follows:—

"TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, February 16, 1883.

W. J. POLLOCK, ESQ.,
Collector 1st District, Philadelphia, Pa.:—

SIR: The claim of Richard C. Ridgway for the refunding of $7,929.29 tax paid on spirits alleged to have been lost by leakage while in warehouse is hereby rejected, in conformity to the opinion of the Attorney-General dated May 5, 1880 (Opinions, vol. 16, p. 667), which holds that no allowance for leakage of spirits in warehouse was authorized under the Act of July 13, 1866.

Respectfully,

GREEN B. RAUM,
Commissioner."

Upon the foregoing findings of fact the Court decided as a conclusion of law, that the claimants petition must be dismissed.

The Ridgway case and the others, including that of John Stewart, notwithstanding the rejection on February 16, 1883, were reopened and again reconsidered, and were at last finally rejected on April 28, 1886 (Record, p. 13, testimony of John F. Cline, deputy collector, and Department letter to Mr. Neill, dated April 28, 1886, Record, p. 13).

ASSIGNMENTS OF ERROR.

The Circuit Court of the United States for the Eastern District of Pennsylvania erred:

I. In refusing to charge the jury as requested in the second point of charge submitted at the trial by the plaintiff in error (plaintiff below), which is as follows:—

"That at common law the plaintiff became forthwith entitled to bring an action against the defendant's testator in his individual capacity, and not as a United States collector of internal revenue, which right was suspended by the Act of Congress, until plaintiff had appealed from the illegal tax to the Commissioner of Internal Revenue, and his appeal was finally rejected by the Commissioner of Internal Revenue, April 28, 1886."

II. In refusing to charge the jury as requested in the third point of charge submitted by the plaintiff in error (plaintiff below), which is as follows:—

"That upon the final rejection of the plaintiff's claim by the Commissioner of Internal Revenue, the plaintiff's right of action against the defendant's testator in his individual capacity revived, and his action must be commenced within one year thereafter, and this action was brought within the statutory time; as the record shows."

III. In refusing to charge the jury as requested in the fourth point of charge submitted by the plaintiff in error (plaintiff below), which is as follows :—

"That the measure of liability of the defendant's testator is the amount of the tax illegally exacted by him from the plaintiff, to wit, $250.40, with interest at six per centum from June 26, 1869 to the date of the verdict, subject to a credit of $241.78, which is the amount of this claim."

IV. In refusing to charge the jury as requested in the fifth point of charge submitted by the plaintiff in error (plaintiff below), which is as follows :—

"That the sum of $241.78 paid plaintiff on the 17th day of August, A. D. 1886, was not a payment of his claim made by his appeal to the Commissioner of Internal Revenue under the acts aforesaid, and that said claim had previously been rejected and was not pending in the Treasury Department at that time. The same was a voluntary payment by the United States, without any conditions, of a part of a sum of money then due to the plaintiff, not from the United States, or in recognition .of the plaintiff's rejected claim, but from the defendant's testator in his individual capacity. This sum was paid, and received expressly on account."

V. In refusing to charge the jury as requested in the sixth point of charge submitted by the plaintiff in error (plaintiff below), which is as follows —

"The plaintiff may, and has elected to apply this sum as a payment on account of the sum of $507.83, to wit, $250.40 the excess of tax, and $257.43 interest thereon from June 26, 1869, to August 17, 1886, which was upon that day due to the plaintiff by defendant's testator, and the plaintiff is entitled to $266.05, with interest thereon to date.'

VI. In refusing to charge the jury as requested in the seventh point of charge submitted by the plaintiff in error (plaintiff below), which is as follows :—

"The present action is not against the United States, nor is it an action against the defendant's testator in his capacity of a United States collector of internal revenue, but the same is an action against him in his individual capacity, and is to be governed by the same rules as other actions between private citizens."

VII. The Court below further erred in charging the jury as follows:—

"Although I do not give you any binding instructions to that effect, yet in the judgment of the Court, under all the evidence in the case, the defendent here is entitled to a verdict. As the case is presented to you, in the judgment of the Court, you could only find a verdict properly in favor of the defendant."

ARGUMENT.

The original contention, to wit, that the tax exacted by the collector was excessive, is no longer an open question. The Court below so held, and no exception was taken to the ruling. Mr. Stewart having paid the excessive tax in order to take the spirits out of bond, which would otherwise have been confiscated, and having appealed to the Commissioner of Internal Revenue for a refund, the claim was, after various vicissitudes above detailed, finally rejected on April 28, 1886.

First.—The legal relations of the parties and of the Government upon the rejection of the claim for a refund.

The legal relations of John Stewart and the estate of William H. Barnes were then and there *ipso facto* fixed and determined.

Mr. Stewart had a right of action against Barnes' estate, which action he could begin within one year, and therein he could recover not only the amount of the excessive tax paid by him on June 26, 1869, but under the decisions

of this Court he was entitled to interest on this payment up to the verdict. Moreover, the position of the United States became at the same time definitely fixed and ascertained, by virtue of the provisions of Section 989, Revised Statutes, as thereunder a judgment against the estate of the deceased collector, which would have included the interest, would have become a claim against the United States, payable out of the Treasury, because Barnes had acted under the direction of the Commissioner of Internal Revenue in exacting the excessive tax.

The Right of Action.

The right of action whether at common law or by statutory implication is unimportant, and is established in the following cases:—

Elliott vs. *Swartout*, 10 Peters, p. 159.

"From this view of the cases it may be assumed as the "settled doctrine of the law that where money is illegally "demanded and received by an agent he cannot exonerate "himself from personal responsibility by paying it over "to his principal, if he has had notice not to pay it over. "* * * On the third question, it is the opinion of this "Court, that the collector under the circumstances, as stated "in the said question, is liable to an action to recover back "an excess of duties paid to him as collector, although he "may have paid over the money into the Treasury."

City of Philadelphia vs. *Collector*, 5 Wall., p. 731.

"Necessary implication from those provisions is that "actions may be maintained against collectors of the inter- "nal revenue to recover back duties illegally or erroneously "assessed." * * * "Evidently those clauses of the "section contemplate different grievances and different "remedies for their redress as known at common law and "in the practice of the courts."

Collector vs. *Hubbard*, 12 Wall., 14.

Cites *Philadelphia* vs. *Collector*, 5 Wall., 730, to the effect that the right of action against the collector is not under the common law, but rested upon a necessary implication from the several provisions of the internal revenue acts, "that Congress intended to give the tax-payer such remedy."

Erskine vs. *Van Arsdale*, 15 Wall., 77.

"Taxes illegally assessed and paid may always be recovered "back if the collector understands from the payer that the "taxes are regarded as illegal, and that suit will be instituted "to compel the refunding of them.

"The third exception is to the instruction that if the jury "found for the plaintiff they might add interest. This was "not contested upon the argument, and we think it clearly "correct. The ground for the refusal to allow interest is "the presumption that the Government is always ready and "willing to pay its ordinary debts. Where an illegal tax "has been collected, the citizen who has paid it and has "been obliged to bring suit against the collector is, we "think, entitled to interest, in the event of recovery, from "the time of the illegal exaction."

Interest is Payable.

Notwithstanding the general rule that the Government is not chargeable with interest, the following cases are relied on as establishing the liability when the Department has refused a refund, except only where *after suit* is brought, the plaintiff is guilty of *laches*. In the case at bar appellant had been guilty of no *laches* in prosecuting his suit against the collector, and as to the delay in the Department it has been shown that the Government officers caused it, and moreover, *delay* in prosecuting the appeal in the Department even if caused by the claimant, would be no bar in his subsequent suit against defendant.

Redfield vs. *Ystalyfera Iron Co.*, 110 U. S., p. 174.

Here on an action against a collector of customs for duties illegally collected there was a verdict *pro forma* for $1,500 in 1856, subject to the action of the Court, thereafter in a case stated, etc.

Nothing further was done in the case until 1883, when the amount of the excessive tax was liquidated by the Court at $750, and interest was allowed from 1854.

Held, that on account of the plaintiff's *laches* interest should only be allowed from April 30, 1883.

Erskine vs. *Van Arsdale*, 15 Wall., 75, cited, and distinguished from the case at bar on account of plaintiff's *laches*.

Commissioners vs. *Buchner*, 48 Fed. Rep., 533.

The Commissioners of Louisville brought suit to recover interest on taxes illegally collected by the defendant's testator, who had been a collector of internal revenue.

The taxes were paid without protest, and no application for a refund was made within the time fixed by law; subsequently a special act was passed, under which the department decided that the tax was illegally collected, and a refund of the taxes was allowed without interest; on demurrer the Court held that there was no claim which could have been enforced against Buchner, and that the bar of the statute was not removed, as to him, and as a claim, against the United States, the statute only relieved the claimant from the bar of the statute, and neither gave or contemplated the allowance of interest. Hence the demurrer was sustained.

United States ex rel. Angarica vs. *Bayard*, 127 U. S., p. 251.

This case is *sui generis* and depends upon its own peculiar facts. Where Spain paid the United States a sum of money ascertained to be due by the Spanish-American Claims Commission, a claimant cannot compel the United States to allow interest on the fund in its hands.

P. 260. "The case, therefore, falls within the well-"settled principle, that, the United States are not liable to "pay interest on claims against them in the absence of "express statutory provision to that effect."

United States vs. *Sherman*, 98 U. S., p. 565.

Where the Court grants a certificate of probable cause under Section 8 of the Act of July 28, 1866, the amount payable out of the Treasury does not include interest on the judgment before such certificate was given.

P. 567. "When the certificate is given the claim of the "plaintiff in the suit is practically converted into a claim "against the Government, but not until then."

It was held that the plaintiff might have immediately applied for the certificate, and, having waited five years, could not "compel the United States to pay interest on a "judgment which it was ready to pay as soon as its liability "accrued."

Monroe vs. *Fohl*, 14 Pacif. Rep., p. 514.

Payment of a given sum of money on a note four months after date, the interest on the note being payable annually, and the payment exceeding the annual interest on the note, operates in the absence of special agreement as a payment of the principal indebtedness, so far as the sum paid exceeds the interest then due, and is not a payment of unearned interest.

Schell vs. *Cochran*, 107 U. S., p. 625.

Here judgment was recovered below against the collector, and included interest. On appeal the judgment was affirmed with interest, under rule 23. *Erskine* vs. *Van Arsdale*, 15 Wall., 75, cited.

Now the decisions of this Court recognize the right of the tax-payer to recover interest from the collector, and Section 9 of the Act of July 28, 1866—practically similar to Section 989 of the Revised Statutes—as construed by this Court,

determines that Congress intended that in such cases the United States should pay interest by paying the judgment against the collector, which would have included interest. Even assuming this case to be in fact and law as well as in effect a claim against the United States, this action of Congress therefore takes this case out of the category of cases in which the Government is not liable to pay interest, and it has elected to occupy another position, viz., that of an ordinary litigant.

The reason is quite obvious. The general rule exempting the United States from the payment of interest is based upon the legal presumption that the United States is always willing and ready to pay what it owes.

But in this class of cases there is no room for such a supposition, because an action against a collector can only be begun after the United States has, through the Commissioner of Internal Revenue definitely excluded itself from the position of a debtor willing and ready to pay and by refusing to pay, elects to occupy the attitude of a litigant—through the remedy given against its collector—and engages to liquidate any claim that may be established against him with interest, by paying the judgment against him.

Congress then, on July 26, 1886, passed the private act under which John Stewart was on August 17, 1886, paid on account the sum of $241.78.

Second.—The legal relations of the parties and of the Government after the payment on account.

Now, what were the respective positions of the claimant, and of the collector and of the United States on August 17, 1886, immediately before this payment? Simply this, Barnes' estate owed the claimant $250.40, with interest from June 26, 1869, amounting to $507.83, for which amount judgment might have been recovered and this sum of money would thus have become a debt of the United States to John Stewart as soon as he obtained judgment against the collector's

estate and had that judgment certified to the Treasury for payment, under Section 989, Revised Statutes.

There was, therefore, a defined legal liability to the claimant for principal and interest, which needed only the formality of a suit and certificate, under the Revised Statutes, to turn into money.

In these circumstances the United States, as the party ultimately liable, comes forward and recognizing its future responsibility, appropriates to Mr. Stewart, without imposing any *conditions*, $241.78. This secures him no interest and nothing for the fractional gallons, counted as full gallons, and leaves unpaid $266.05 of his claim against the estate of Mr. Barnes, the late collector.

In the case of *Nutt* vs. *United States*, 125 U. S. Rep., p. 650, the private act under which part of Nutt's claim was paid expressly provided that the amount appropriated should be paid "upon a full and final discharge" being given by the claimant to the Government.

Now the private Act of Congress in the case at bar does not provide that payments thereunder shall be held to be in full, nor does it provide for the form of a receipt or in any other way indicate as a condition for the receipt of the money under its provisions that the claimant shall surrender any portion of his claim. It evidently meant to work no change in the legal relations of John Stewart and the late collector, or in those of the United States. It simply left the parties where it found them, except to the extent that Stewart's claim directly against Barnes, and ultimately against the United States was by payment on account reduced from $507.83 to $266.05.

Not only was this the obvious effect and meaning of the statute, but in order to prevent any claim to the contrary being thereafter made by the United States that the payment was intended and understood by the parties to be in full, Mr. Stewart, in order to protect his legal rights, expressly

stipulated that the payment was only "on account," and this is distinctly stated in the receipt. (Record, p. 16).

The Government agreed to Mr. Stewart's view of the transaction and accepted a receipt on account, and hence there was no final settlement between the claimant and the United States.

Indeed, the amount received was less than the accrued interest and it needs the citation of no authority for the well-established proposition that, in the absence of any stipulation between the parties, a payment on account of a debt bearing interest is first applied to extinguish the interest and the balance, if any, is applied to principal.

As the amount did not even pay the interest, there was, on August 17, 1886, after the payment on account, still due from Barnes' estate, $266.05, viz., the entire principal and a balance of interest.

It has been shown that the delay in the case was not caused by Mr. Stewart, but by the United States, which did not finally reject his claim until April 28, 1886, and he brought his action within one year thereafter and prosecuted it to trial as rapidly as possible.

The United States cannot fairly impute its delay to the claimants. It is true that under Revised Statutes, Sec. 3,226, Stewart might have brought his action at the end of six months after making his appeal and without waiting for its rejection, but he had a right to expect that in time it would be allowed, as the Ridgway case was actually allowed, yet the claim was finally rejected, as above mentioned, on April 28, 1886.

The statement of facts under the head of Department Delays makes this very clear.

It is therefore submitted that after the payment on account of $241.78, on August 17, 1886, there still remained due from Barnes' estate to the appellant the entire principal indebtedness, viz., $250.40, and that the Court should have directed a verdict for plaintiff for that amount and interest from August 17, 1886.

If this were a case between individuals, there would be no question of the correctness of these contentions, and the only reason given for a contrary view, viz., the general rule that the Government is not chargeable with interest, has been shown not to apply, both because the presumption on which it is founded, viz., supposed willingness to pay, does not exist in the present case, and further because Congress has expressly admitted its liability for interest by means of Sec. 989, Revised Statutes, providing for the payment of judgments against collectors, which judgments themselves include interest, and the judgment, too, likewise bears interest where the Government appeals to the Supreme Court.

That the parties themselves, *i. e.*, the United States and the claimant, were not making a final settlement is shown by their own act, in the one giving and the other receiving a receipt expressly stated to be "on account."

A PARTIAL PAYMENT ONLY SETTLES A CLAIM WHEN THE CLAIMANT RECEIPTS IN FULL.

The following cases are relied on to show that a part payment settles the claim only where it is stipulated to be a settlement *in full.* Here it was given and received distinctly *on account.*

Sweeney vs. *United States*, 17 Wall., 75.

A steamer was chartered on behalf of the Government at $175 per diem, which was afterwards increased to $200 per diem, without any term of service being specified, and was so paid for some time. Later payments were made at the rate of $140 per diem. On complaint made, an additional $5 per diem was allowed over a considerable period of time. When the money was paid Sweeney, the owner of the steamer gave a receipt "as in full of the above account," being the account for the steamer's services.

Held that this precluded Sweeney collecting the balance in the Court of Claims.

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"If the claimant voluntarily enters into such a com-"promise and accepts a smaller sum than the claim, and "executes a discharge in full for the whole claim he is "bound by the adjustment."

United States vs. *Martin*, 94 U. S. Rep., p. 400.

This was a claim for overtime under the eight-hour law. The claimant was paid a per diem on the basis of twelve hours to the day. Subsequently on a claim for overtime the claimant was paid by the Treasury $205.63, which was less than the claimant would be entitled to, calculating his whole employment on the basis of eight hours per day. He receipted for the $205.63 in writing in full of the account.

Held this was a bar.

Murphey vs. *United States*, 104 U. S., p. 464.

A claim for damages by a contractor was settled by the Navy Department on a basis agreed upon by him and amount paid, and a receipt in full was given.

Subsequently suit was brought for another item of claim not specifically mentioned in the adjustment made by the Department.

Held that the suit was barred.

Nutt vs. *United States*, 125 U. S., p. 650.

Under an Act of Congress, the Quartermaster-General reported on Nutt's claim, and subsequently an Act was passed appropriating to Nutt and others, sundry amounts named in the bill as "an allowance of certain claims re-"ported by the accounting officers * * * *the same* "*being in full for and the receipt for the same to be taken and*

"*accepted in each case as a full and final discharge of the "several claims examined and allowed.*"

The amount of the appropriation to Nutt's estate was $35,556.17, the amount certified by the Quartermaster-General was $256,884.05. Nutt's executor accepted the amount appropriated and receipted therefor under the Act of Congress.

Held that no claim could be sustained for the balance of the amount found to be due by the Quartermaster-General.

Eastern R. R. Co. vs. *United States*, 129 U. S., p. 391.

The company was transporting mails under a written contract. Notice was given that after the expiration thereof, the Department would continue the transportation at a rate therein mentioned for four years, "unless otherwise ordered." Subsequently, under an Act of Congress, the Department reduced the rate by notice, five per centum. The company made no objection, and accepted the reduced amount from time to time to the end of the four years, and then brought suit for the amount of the reduction.

Held that they could not recover.

De Arnaud vs. *United States*, 151 U. S. Rep., p. 483.

This case, only recently decided, does, it is submitted, clearly sustain the proposition that in the case at bar the receipt of John Stewart "on account" for the money paid under the private Act of Congress does not preclude his recovery from the defendant in error of the whole amount of his claim with interest less the amount paid on account. De Arnaud had been employed in the secret service of the United States under Gen. Fremont, and his claim was paid out of the secret service fund of the War Department. He presented a claim on January 6, 1862, for $3,600. The Secretary of War allowed the claim January 14, 1862, thus: "I am willing to allow $2,000 in full of the claim, and the

"Dis. clerk, War Department, is authorized to pay that "sum."

"SIMON CAMERON,
"*Secretary of War.*"

On January 21, 1862, the claim was paid, and de Arnaud gave the following receipt:—

"THE UNITED STATES TO CHARLES DE ARNAUD, *Dr.*

"JANUARY, 14, 1862.

"For services and expenses as special agent of the Gov- "ernment, $2,000. Received, Washington, January 21, "1862, from John Potts, disbursing clerk for the War De- "partment, two thousand dollars in full for the above "account.

"CHARLES DE ARNAUD."

Twenty-four years afterwards the Treasury Department referred the claim to the Court of Claims, where it was dismissed. The Court held that it was barred by the Statute of Limitations, as well as by reason of the claimant having given a receipt in full when he received the $2,000.

It is to be observed that not only did de Arnaud give a receipt in full, but that very payment was made under a special allowance by the Secretary of War of that amount upon the claim of $3,600 "in full of the claim." Hence, both the Government and de Arnaud were fully in accord, and the payment was in law and in fact "in full."

United States vs. *Child & Co.*, 12 Wall., 232.

In this case Child & Co. claimed that the United States had been indebted to them in the sum of $478,119.62. Payment of this and other claims was suspended, and they were referred to a military commission, which, after taking forcible possession of claimants' vouchers, reported that $163,111 should be deducted from their claim. Subsequently an Act of Congress was passed for the payments of

the amounts reported by the military commission, which "shall be paid by the disbursing officers in each case on a "presentation of the voucher with the commissioner's cer- "tificate thereon in any form plainly indicating the allowance "of the claim and to what amount."

The claimants at the time of receiving payment made no formal objection or protest, but were required to and did sign a receipt *not under seal and without consideration*, whereby they acknowledged having received such reduced amounts "*in full of the above account.*" The Court of Claims held that the finding of the military commission was not an award, and that there had been no submission to it, and that the receipt had been signed under duress, and allowed the claim for the balance of $163,111.

The Supreme Court reversed the Court of Claims and entered judgment in favor of the Government upon the express ground that there was no duress, and that the Act of Congress was equivalent to an offer by the Government accepted by the claimant. The Court puts this offer by the Government thus:—

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"We will pay you a certain sum on this disputed claim, "provided you will take it in full satisfaction of the whole; "when, without intimidation, without fraud or concealment "on the part of the Government, *without protest or objection* "*on their part the claimants accept the money offered and sign* "*a receipt acknowledging it to be* IN FULL OF THE WHOLE CLAIM. "*Is not this a legal and binding compromise of the disputed* "*demand?*"

In this case and in the case of *United States* vs. *Adams*, 7 Wallace, 463, and again reported in 9 Wallace, 554, this Court found that there had been a submission of the claim to a commission, which made an award, and that accepting the award made thereunder, and giving a receipt in full, was a bar to any claim for the balance which the commission

had rejected. There is, however, no room for such a contention in the present case, as is shown by the record.

In the Court below the following point was affirmed without exception on the part of the defendant, viz. (Record, p. 17):—

> "IX. That the Commissioner of Internal Revenue had no judicial "functions to perform under the private Act of July 26, 1886, and his "duty thereunder was purely ministerial and was limited to ascertain- "ing what excessive tax had been exacted from the plaintiff, and this "inquiry and the payment of $241.78 to the plaintiff were solely by "virtue of the provisions of the said private Act of Congress."
> "Affirmed."

T. W. NEILL,
JAMES W. M. NEWLIN,
for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAR 21 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN STEWART, PLAINTIFF IN ERROR,
v.
BENJAMIN H. BARNES, EXECUTOR OF William H. Barnes, deceased, late collector of internal revenue.
No. 316.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN STEWART, PLAINTIFF IN ERROR,
v.
BENJAMIN H. BARNES, EXECUTOR OF William H. Barnes, deceased, late collector of internal revenue. } No. 316.

BRIEF FOR THE UNITED STATES.

This suit was brought in April, 1887, in the court of common pleas of Bucks County, Pa., and removed in October, 1887, by certiorari to the circuit court of the United States for the eastern district of Pennsylvania.

The declaration is in assumpsit, and contains only the common counts.

From the bill of particulars (p. 7), it appears that the amount claimed and demanded in this suit is $250.40.

In April, 1889, the case was tried by jury and a verdict rendered for the defendant, upon which judgment was entered, and the case is here now upon writ of error. The errors complained of being certain instructions to the jury, asked for on behalf of the plaintiff and refused by the court.

THE CASE.

The case is remarkable in this, that it appears from the certificate of facts proven, and indeed is not denied by the plaintiff in error, that he has already received from the United States the whole amount which he is now here demanding, shall be paid to him again out of the estate of the defendant's testator (except $8.62).

William H. Barnes was collector of internal revenue for the first district of Pennsylvania, and John Stewart, the plaintiff in error here, owned certain spirits, which had been manufactured and placed in the United States bonded warehouse prior to July 20, 1868.

On June 26, 1869, the plaintiff withdrew for sale or consumption certain of this spirit, and was charged taxes thereon as follows:

Of actual spirits withdrawn, 1,819·14 gallons, at $62\frac{7}{30}$ cents	$1,132.11
On increase (fractions counted as wholes), 13·86 gallons, at $62\frac{7}{30}$ cents	8.62
On spirits alleged to have been lost in U. S. warehouse, 388·54 gallons, at $62\frac{7}{30}$ cents	241.78
Total exacted and paid June 26, 1869	1,382.51

The above amount of taxes ($1,382.51) was paid by the plaintiff to the defendant's testator, who was then collector of internal revenue in the first district of Pennsylvania.

Of the amount thus paid it is contended, and is undoubtedly true, that as to $8.62, that amount represented spirit which the plaintiff did not draw from the warehouse because it never existed; it was made up by charging him with whole gallons instead of fractions of gallons which he did draw out; and the item of $241.78 also

represented spirit which the plaintiff did not draw from the warehouse because it had been lost by evaporation or otherwise before he drew.

It appears that on July 26, 1886, the Congress of the United States, by a special act, required the Secretary of the Treasury to refund to the plaintiff in error the amount of the item of $241.78. (See p. 15.)

It further appears that on August 17, 1886, that amount of $241.78 was paid to the plaintiff in error here by the Commissioner of Internal Revenue, "on account of my claim, No. 10073, for taxes improperly paid by me." (See p. 16.)

The theory of the present demand appears to be that the payment of $241.78, made by the United States on account of this claim, was appropriated by the plaintiff in error in default of any specific appropriation of it by the United States to the payment of the *interest* which plaintiff claimed had accrued on the principle of his claim from June 26, 1869, to August 17, 1886.

On the trial of the cause plaintiff in error asked for nine specific instructions to the jury (which appear on pp. 16–17). Of these the court granted the first, eighth, and ninth, and refused the others.

ARGUMENT.

The amount here demanded and sued for is, as appears by the bill of particulars, $250.40.

Section 3228, Revised Statutes, provides:

> All claims for the refunding of any internal tax, alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been

> collected without authority, or of any sum alleged to have been excessive, or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued: *Provided*, That claims which accrued prior to June 6, 1872, may be presented to the Commissioner at any time within one year from said date. But nothing in this section shall be construed to revive any right of action which was already barred by any statute on that date.

And in *Savings Institution* v. *Blair* (116 U. S., 205), this court said:

> When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and of course the right of suit is gone. We regard the presentation of the claim to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the Government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him. (*Cheatham* v. *United States*, 92 U. S., 85; *Railroad Co.* v. *United States*, 101 U. S., 543; *Arnson* v. *Murphy*, 115 U. S., 579.)

The claim here demanded and sued for has never been presented to the Commissioner of Internal Revenue. It is true that on August 3, 1871, the plaintiff in error did present a claim for $241.78, which, in October, 1871, was

rejected and that he subsequently renewed this claim for $241.78, and it was again rejected April 28, 1886, it appearing that on May 5, 1880, the Attorney-General, in response to a request for his opinion, from the Secretary of the Treasury, as to the validity of this claim, with that of Richard C. Ridgway and others, held: That under the provisions of the Internal Revenue law the tax was properly chargeable upon the spirits in the warehouse without regard to leakage or evaporation (16 Opins., 667), and January 12, 1893, the same view was taken by Mr. Brewster, then Attorney-General. (17 Opins., 500.)

The claim here demanded for $250.40 is another and wholly different claim from that of $241.78 which had been presented to and rejected by the Department.

This appears to have been the view taken by the district attorney and enforced by the court below, as I infer from what appears on page 13.

IS THE DEFENDANT LIABLE IN ASSUMPSIT.

There are many cases where one who receives money wrongfully will be held liable as upon an implied promise to pay the amount so improperly appropriated. But from the time of Lord Mansfield it has been required as an essential feature of the transaction that the money so taken shall have been appropriated by the wrongdoer to his own use.

With respect to goods wrongfully taken and sold by a person, *acting for his own benefit*, it is clear that the owner, having a right to maintain an action of trespass or trover for the property, may waive the tort, affirm the sale, and

bring an action against that person for the money thus received by him. (*Jones* v. *Hoar*, 5 Pick., 290; *Gilmore* v. *Wilbur*, 12 Pick., 125; *Butts* v. *Collins*, 13 Wend., 154.)

In England and in this country the sheriff who seizes and sells goods unlawfully has been held liable to the owner of the goods for the wrong thus done him, and the remedy employed has been trespass or trover.

In New York, when a collector of taxes levied on the goods of one man for taxes assessed against another, and sold the goods, *not for his own benefit*, but in his official character, as his estate was not benefited by the trespass, it was held he could not be held liable in assumpsit. (*Osborn* v. *Bell*, 5 Denis, 376.)

Beardsley, C. J., saying:

> Now, in the case before us, it is quite clear upon the evidence that no action for this supposed injury would lie against the personal representatives of the defendant. Trespass would not, for it dies with the person, and assumpsit would not, for no property was acquired by the defendant. His estate has not been benefited by the trespass, if it was one, upon which ground alone are the personal representatives ever held liable for the wrongful acts of a testator or intestate. As the personal representatives of the defendant would not be liable in this case, I think it clear that he can not be charged in assumpsit, for these goods as sold to him. * * * If this action can be maintained against the defendant, as for goods sold, it will follow that the personal representatives of every deceased sheriff, coroner, or constable, who had wrongfully seized and sold property on execution, must be held liable to respond to the full value of such property, although the proceeds of the sale

> had been paid over to the creditor in the execution, and the property of the deceased officer had not received a farthing's benefit from the tortious act. * * *
>
> "It is a principle well settled," says Chief Justice Mellen (5 Greenl., 322), "that a promise is not implied against or without the consent of the person attempted to be charged by it. (*Whiting* v. *Sullivan*, 7 Mass., 107.) And where one is implied it is because the party intended it should be, or because natural justice requires it in consequence of some benefit received. It was not shown on the trial of this cause that the defendant had received any benefit from the seizure and sale of the property in question. No express promise to pay for the goods was pretended, and every feature of the transaction repels the idea that the defendant intended to have one implied from what he did.

And in Keener on Quasi Contracts, treating of waiver of tort, it is said, p. 160:

> Assuming a defendant to be a tort feasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the defendant has been impoverished by the tort is not sufficient. If the plaintiff's claim then is in reality to recover damages for an injury done, his sole remedy is to sue in tort.

Now, here, in this case, not only is the alleged wrongdoer dead, and was dead when this suit was brought against his personal representative, but it is not pretended that his estate was enriched or he in any manner benefited by the receipt of the money which it is alleged was unlawfully exacted from the plaintiff in error. But that the money so paid went into the Treasury of the United

States appears from the power of attorney given by the plaintiff in error to his attorney Mr. Neal (p. 14) and by the act of Congress (p. 15).

And so far as the payment itself of this money by the plaintiff in error is concerned, it nowhere appears from the evidence in this record that it was not his own free and voluntary act. There is nothing to justify the inference that he did not at the time agree in opinion with Mr. Barnes, the collector, and with at least two of the Attorneys-General of the United States, whose opinions are cited above, that the amount paid by him as tax was lawfully due from him to the United States. The only fact which appears in evidence is that he did pay the money. There is nothing from which the law will presume or this court can infer that if any error or mistake was made in such payment it was not the error and mistake of the plaintiff himself, and that it was the error of Barnes, whose estate he is seeking to subject to this demand.

PLAINTIFF HAS NO CAUSE OF ACTION.

The plaintiff's claim, as twice presented to the Commissioner of Internal Revenue for payment before the institution of this suit, was for $241.78. That amount, as the full amount of his claim, was directed to be repaid him by the Secretary of the Treasury by an act of Congress approved July 26, 1886, three months from the date when his claim had for the second time been rejected by the Department of the Government to which it had been presented. And on August 17, 1886, the exact sum, $241.78, was paid to the plaintiff in error by the Commissioner of Internal Revenue.

As heretofore shown, the plaintiff in error has seen proper to recast and reform his account so as to allow credit for the amount paid him by the Government and still have a claim much larger than the original amount claimed by him.

In the sixth instruction (p. 17) asked for by him and refused by the court the account is thus stated:

To amount of spirits lost in warehouse by leakage, etc	$241.78
By amount of increase (whole gallons over fractions)	8.62
	250.40
To interest from June 26, 1869, to August 17, 1886	257.43
	507.83
By credit as of August 17, 1886	241.78
Balance due	266.05

Now the utter absurdity of all this is shown when we consider what the plaintiff's original remedy was and the result of the remedy which he has elected to employ.

His declaration (p. 6) is "a plea of trespass on the case upon promises." His complaint is that he was wronged and injured by the act of Barnes, collector. For such wrongs and injuries his remedy was trespass or case. He claimed, however, that he had the right to waive the tort and proceed as upon an implied promise from Barnes.

He exercised this right of election for the first and only time when by his praecipe (p. 4), May Term, 1887, he directed a summons in case to be issued against the defendant. As interest could not be claimed or recovered on

damages awarded for injuries, so interest can not accrue in assumpsit until the election is made to waive the tort and sue in assumpsit.

In *Dougherty* v. *Chapman* (29 Mo. Ap., 233), cited in Keener on Quasi Contracts, p. 175, it is said:

> The plaintiff's right to waive the tort and sue in assumpsit for the proceeds of the sale, was authorized by an implied promise, raised by law, on the part of the defendant that he would pay the money to the plaintiff. * * * By electing to waive the tort, the plaintiff became entitled to the proceeds of the sale, but up to that time he was not entitled to such proceeds. The right to the proceeds accrued by force and at the moment of election and not before. As the plaintiff was not entitled to the proceeds of sale until he made the election, as a matter of course he was not entitled to interest thereon prior thereto.

Of course, when the plaintiff presented on two occasions, with an interval of several years, his claim against the Government for $241.78; and when, in July, 1886, he again had it inserted in the special act of Congress, passed for the relief of himself and others, as $241.78; and when, in less than a month after passage of the act, he received from and receipted to the Commissioner of Internal Revenue, for $241.78—all this imported, and was doubtless intended by all parties to mean, that this man's claim was for $241.78, and no more. The feature of *interest* is a manifest afterthought, introduced for the purpose of absorbing the entire amount which he had theretofore accepted in satisfaction of his entire claim.

In this view of the case, I think the instructions were properly refused because irrelevant to any issue in the

case; and because the plaintiff has wholly failed to prove any case stated in either of the common counts of his declaration, because no cause of action for the alleged wrong survived against the personal representatives of the alleged wrongdoer; and because no action "on promises" would lie where no promise had been made, where no benefit, advantage, or enrichment of estate had accrued to the defendant, or his testator; and because the instructions were fallacious and unsound, even upon the theory on which the suit was brought and prosecuted.

HOLMES CONRAD,
Assistant Attorney-General.